

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE

38

IN THE

**United States Court of Appeals
for the District of Columbia Circuit**

October Term 1948

No. 10014

MATTHEW M. MEZZANOTTE,
Appellant,

v.

JOSEPH E. BRUNO, ET AL.,
Appellee.

APPEAL FROM JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

*United States Court of Appeals
for the District of Columbia
Circuit*

FILED JAN 10 1949

Joseph W. Stewart

CLERK

HERMAN MILLER,
Attorney for the Appellee,
800 H Street N.W.

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In addition to the statement of fact contained in the appellant's brief, the record further discloses that when the contract was executed in the name of D. Hilleary, the appellant did not have his office with the appellee. (App. 9.)

While the complaint alleges the appellant had negotiated, for himself the purchase of the premises, it was not disputed, nor was it an issue, that the appellant never completed his purchase of the property, but did undertake to, and acted as a sales broker and agent for the original owner Papas (App. 9, 18-20) and in that capacity attempted to sell the property to the appellee for \$25,000.00. (App. 9.)

At the time of the negotiations, the appellant and the appellee were competitive real estate brokers, and no facts were alleged showing any duty owing to him by the appellee, nor was any consideration paid of any kind for any service, nor was it shown that any relationship existed between them other than first cousins. (App. 9-10.)

The facts further conclusively show that the appellant was acting as an agent and sales broker for the owner Papas, and as such received a commission. This appears in the exhibit which is the sales contract and also in the settlement sheet of the title company, and is admitted by the appellant in his affidavit. (App. 18.) The undisputed facts are also that all papers were recorded by the Title Company simultaneously which fact was known or should have been known to the appellant. (App. 10.) The record further shows that the appellee purchased the premises for \$20,500.00 which was \$1,000.00 in excess of the listing held by the appellant for his principal. (App. 10.)

It is likewise indisputable, that the claim made by the appellant in the complaint would result in his securing both a commission as an agent, permit him to receive as a principal a claim in connection with the sale of the property. (App. 12.)

SUMMARY OF ARGUMENT

1. A. The record does not show, in any respect, any confidential relationship or position of trust owing the appellant from the appellee. The bare allegations by the appellant that he relied upon the appellee because of the appellee's experience and position in the real estate field,

and because the appellee counseled him that the best first trust loan obtainable for the appellant was \$11,000.00, without more, does not entitle the appellant to any cause of action.

B. The elements which might form the basis of the appellant's claim are absent. The complaint shows that any alleged statement of the appellee was merely (1) an expression of opinion; (2) a matter or act to be done in the future; (3) a statement upon which the appellant had no right to reply; (4) the means at hand were open equally to both the appellant and the appellee; (5) no damages to which the appellant was legally entitled are shown.

2. While the contract remains executed and the appellant admitting his receipt of commission as a sales broker, he is disqualified from making a claim in a capacity as an owner under prior contemplated negotiations which did not result in a purchase by him.

3. The claim made by the appellant, if permitted, would result in securing a profit by the appellant as an owner, at a time when he was purely an agent, and such action would result in violation of Title 45-1408 D. C. Code. (1940 Supp. VI.)

ARGUMENT

1. A. There was no dispute of such facts material to the issue herein which prevented the granting of the motion for summary judgment for the appellee. We contend the Court's judgment was correct, and in arriving at such judgment, these facts are not disputed.

First, the parties were first cousins. This fact alone does not make the appellee responsible to the appellant any more than any other person in a business transaction.¹

Second, both parties were duly licensed real estate brokers, licensed by the Real Estate Commission. The Broker's Act (Title 45-1404, D. C. Code 1940, Supp. VI) provides for certain examinations to be successfully passed by any applicant to test his qualifications. It must be pre-

¹ *Crawford v. Crawford*, 134 Ga. 114, 67 S. E. 673.

sumed that the appellant was familiar with the requirements of mortgages as required of him by the aforesaid act.

Third, the negotiations and the contract which the appellant was attempting to make was not between the appellant and the appellee, but was in the preliminary stages between the appellant and the then owner Papas, and never resulted in any contract being made between them.²

Fourth, no allegations are set forth which will result in the appellant's conclusion that a confidential relationship existed between the parties. Unless this relationship is shown to exist no claim can be made.³ If the appellant's claim is correct, then it would be most dangerous for anyone to express his opinion about any contract to another for in every such case a confidential relationship would result. The appellant was no baby in arms; the appellee was not his guardian. No consideration was paid to the appellee for his opinion, and no consideration was expressed for any information.

Spignul v. Blundon, 53 App. D. C. 29, 287 F. 1006 cited by the appellant has no application here in that the parties had contracted between themselves as to their right to participate in commission which was taken in the form of property. Here there never was any contract between the parties in which each of them acted as principals. The mere inexperience of the appellant, and the fact that the appellee was a member of a Board of Directors does not result in creating confidential relationships even though the parties are cousins.

It must be borne in mind that the final contract concluded was one in which the appellant acted as agent and not as a principal. The appellant does not make any complaint concerning this contract. His only complaint is that he *could* have acquired the property if he obtained a sufficient first trust, and the appellee "counselled" that a first trust of only \$11,000.00 could be obtained for the appellant. On

² *Dawe v. Morris*, 149 Mass. 188, 21 N. E. 313.

³ *Mallory v. Leach*, 35 Vt. 156.

account of this, the appellant elected to act as a broker in the sale to the appellee's straw party on behalf of the then owner. No confidential relationship could exist in these different transactions. The first contemplated transaction was discontinued, and the appellant elected to act as broker in the sale, in a second transaction, in which the property was sold to the appellee. The appellant, a real estate broker, had the whole field before him in his selection. He was not relegated to rely upon the appellee's opinion. There was no showing because of the appellee's "counsel" the appellant was prevented from applying to the numerous financial institutions placing first trusts on Washington property, and no allegation was made that the appellee prevented the appellant from making such other applications. When these parties, being competing real estate brokers, each had the field open to them, such does not create any confidential relationship in a subsequent contract which is admitted to be a proper contract by all parties. This subsequent contract was negotiated by the appellant sometime after the alleged "counsel" of the appellant by the appellee and therefore could not support a claim that a confidential relationship prevailed *ab initio*. Stated another way, the appellant does not complain of any misrepresentations, or fraud or implied trust existed relative to the contract which he actually negotiated and in which he acted as broker and agent, but he states that where the appellee had "counseled" him previously concerning the obtaining a first trust loan, and as a result he elected to act as broker, the fact of the execution of the contract in the second instance will support his claim of a prior confidential relationship. We claim this never could be the law. If any confidential relationship existed which gave rise to the action, it existed when the alleged "counselling" took place, and what thereafter occurred does not create any foundation for the claim of the prior confidential relationship.

The entire answer to this part of the appellant's contention may be concluded by the statement of the Trial Judge

in granting the appellee's motion for summary judgment to the effect that the appellee was not the appellant's nurse maid. If no confidential relationship existed this alone would defeat the appellant's complaint.

B. Another answer to the appellant's complaint may be made. The elements which might form the basis of the appellant's claim are lacking. The allegation by the appellant that at the time of the "counselling" of him by the appellee that the maximum mortgage he, the appellee, could obtain was \$11,000.00 was (1) an expression of opinion, (2) a matter to be procured or done in the future, (3) a statement upon which the appellant had no right to rely, (4) that equal means were at hand available to the appellant even if this were false, and (5) no damages to the appellant was alleged.

Each of these elements may be briefly considered as follows: (1) the counsel that the appellee could secure a mortgage of \$11,000.00. At the time of the alleged statement it is not alleged in any way that the appellee had then secured a mortgage loan for a larger sum. It was not until October 23, 1946, that a loaning agency accepted the *application* from the appellee, and no allegation was made as to when the loan was approved, and it may be conceded that it was approved at least by November 8th, 1946. The very essence of the allegation of the complaint (App. 3) shows futurity in that the allegation is that Bruno "could obtain," and when unaccompanied by any allegation that at the time of the "counselling" he actually had the commitment of the larger amount subsequently procured on November 8, 1946, for \$17,500.00 such counselling was merely a matter of opinion.

It must be remembered that no request was made by the appellant for any amendment, of the pleadings, and therefore it must be conclusive that the appellant could not allege at the time of the "counselling" of the appellant by the appellee the representation was false or that the appellee ever intended to defraud the appellant. The state-

ment can only be regarded and taken as a matter of opinion that Bruno could obtain for Mezzanotte a first trust of \$11,000.00. Possibly this was correct, in that there is no allegation that an application had been made with the *appellant's* credit which would warrant placing a first trust of \$15,000.00, but when taken on the *appellee's* credit the \$17,500.00 could later be procured. The complaint alleges that the first trust "could be obtained for Mezzanotte". This is quite different from obtaining a first trust on the credit of Bruno. Without more, and without showing that there could be obtained a first trust of more than \$11,000.00 on *Mezzanotte's credit* the statement claimed by the appellant was merely an expression of opinion, or judgment of the appellee. The statement of this rule is so universal as not to require citation of authority.

(2) The statement was of a matter to be done in the future. The allegation of the complaint itself is *in futuro*. It is clear that at the time of the alleged statement Bruno had not procured the first trust either for \$11,000.00 nor any larger sum. This necessarily required some action in the future. In *Baker v. Baker*, 54 App. D. C. 214, 296 F. 961, it has been held in this jurisdiction that "no statement as to what will be done, or is intended to be done, in the future constitutes fraud". Any statement of any agreement to do something in the future, or expectations or probabilities do not constitute fraud even if they turn out to be false.⁴ In *Kiser v. Richardson*, 91 Kan. 812, 139 Pac. 373, it was held that fraud cannot be predicated on a promise to make a loan.

(3 and 4). The appellant had no right to rely upon the appellee and, secondly, the means at hand were open equally to both of the parties. These principals have been announced many times by this Court. *Lipschutz v. Phillips*,

⁴ *Lawrence v. Gayetty*, 76 Cal. 126, 20 Pac. 382; *Miller v. Sutliff*, 241 Ill. 521, 89 N. E. 651; *Boulden v. Stilwell*, 100 Md. 543, 60 At. 609; *Knowlton v. Keenan*, 146 Mass. 86, 15 N. E. 127; *Williamson v. Holt*, 147 N. C. 515, 61 S. E. 384; *Rorer v. Trout*, 83 Va. 397, 2 S. E. 713; *Ansley v. Piedmont Bank*, 113 Ala. 467, 21 So. 59.

51 App. D. C. 20, 273 F. 748; *Graziani v. Arundell*, 55 App. D. C. 21, 299 F. 886. See also the leading case of *Shappirio v. Goldberg*, 192 U. S. 232, affirming 20 App. D. C. 185. In this connection there was no allegation that the appellee had control of the mortgage market. Both the appellant and the appellee were real estate brokers, and common sense indicates that the entire range of financial institutions in the District of Columbia were available to both of the parties. No allegation was made that the appellant was prevented from making his own application for a mortgage. Nothing was alleged that the property on which the mortgage was to be procured was peculiar. A clearer application of this rule could not be found. The appellant was not relegated to applying only to the appellee for this mortgage, and any reasonable person acting in the ordinary course of business will know that a person who has procured a real estate license, and who has been found to have qualifications as to knowledge of deeds, mortgages and the real estate business does not have to rely on any other broker to procure a mortgage loan from some financial institution in the District of Columbia.

(5) No damage has been alleged. It is clear the appellant cannot retain the brokerage commission and also receive any alleged profit. Until the second transaction is rescinded the election made by the appellant must be binding upon him as he has received the benefits of it. He cannot retain the commission as an agent and also claim the profits as a principal. Until the second contract is rescinded that contract determines the rights of the parties. See *Baker v. Baker, supra*.

2. While the sales contract remains executed and the appellant, retaining at least part of the brokerage commission, is disqualified from making the claim as asserted in the complaint as an owner. The appellant has, by the consummation of the sales contract to the appellee, in which the appellant is conceded to be the sales broker and agent, elected to continue as an agent. If he is agent, and until

his position as such is eliminated he cannot make a claim as the principal. If any claim is to be made it would be the principal for whom the appellant was acting as agent. He cannot assume a dual role. He is either the agent or the principal, *he cannot be both*. In this case, the contract in which the appellant is agent is consummated and remains outstanding. This determines the rights of the parties. If it were otherwise, the appellant could retain his commission as agent and pursue the claim for profit which he claims as owner. He never became the owner and no liability with all the obligations of an owner ever attached to him and as a result he cannot sustain the claim as a principal. To hold otherwise would violate every known rule of agency.

3. The appellant's claim violates Title 45-1408 D. C. Code. The proposed first transaction which the appellant wanted to have with the former owner was on the express condition that the appellant's purchase was to be net. However, a new transaction was made in which the appellant received a commission. He makes no tender to return the commission, and the net result is that the appellant will continue to keep the commission as well as attempt to reach an additional sum *for himself* in capacity as an owner. He had never become an owner. In such case he will receive both a commission and a profit; he will be acting for his principal Papas as well as for himself. These are the things condemned by the Act, and he would receive compensation from more than one person, although the negotiations with Papas was that the appellant was not to receive any commission.

CONCLUSION

We respectfully submit that the judgment of the Trial Court was correct and should accordingly be affirmed.

Respectfully submitted,

HERMAN MILLER,
Attorney for the Appellee,
800 H Street N.W.